IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-683

CENTURY 21 REAL ESTATE CORPORATION; CENTURY 21 REAL ESTATE OF ARIZONA, INC.; SOUTHERN NEVADA FRANCHISE SERVICE CO., INC.; ROBERT E. BARRETT; AND BARRETT & CO., INC., REALTORS,

Appellants,

v.

NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS; ELIZABETH M. KROLAK; FRED M. SCHULTZ; OLIVIA D. SILVAGNI; CARL F. FUETSCH; AND ANGUS W. McLEOD,

Appellees.

On Appeal from the United States District Court for the District of Nevada

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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Appellees move this Court to dismiss the appeal herein, or, in the alternative, affirm the judgment of the three-judge district court, 448 F.Supp. 1237 (D. Nev. 1978), and its order denying appellants Motion for Reconsideration of Its Opinion (App. A, infra, pp. 10a-12a), on the grounds that the appeal does not present any substantial federal question, that some of the grounds for appeal were not timely or properly raised or expressly passed upon, and that the questions on which the appeal is grounded are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the three-judge district court has been reported at 448 F. Supp. 1237 (D. Nev. 1978). The court's order denying appellants' Motion for Reconsideration of Its Opinion (App. A, infra, pp. 10a-12a), has not yet been reported.

QUESTIONS PRESENTED BY THIS APPEAL

Section VII(4) of the Rules and Regulations of the Nevada Real Estate

Advisory Commission[1] provides that a real estate broker who uses or operates under a franchise name shall incorporate his own name in the franchise name and logotype, and that the broker's name shall occupy at least 50% of the total surface area devoted to the advertisement of the broker's name, the franchisor's name, and or the franchisor's logotype.

The questions raised by Appellants are as follows:

1. Whether the regulation violates any of the Appellants' First Amendment Freedoms.

2. Whether the lower court utilized a proper standard of review in testing the constitutionality of the regulation.

3. Whether the regulation has a rational basis.

4. Whether the regulation creates an unconstitutional irrebuttable presumption.

---

1. Section VII(4) was promulgated pursuant to the authority granted by Nevada Revised Statutes § 645.190(2). Appellants do not challenge the statutory authority of the Commissioners to enact the subject regulation.

5. Whether the Commissioners were biased when they enacted the regulation and whether such bias would be a ground for overturning the regulation.

6. Whether the regulation is preempted by the Lanham Act, 15 U.S.C. §§ 1051 et seq. (1970).

7. Whether the regulation unconstitutionally burdens interstate commerce and whether the lower court properly resolved this issue on motion for summary judgment.

CONSTITUTIONAL PROVISIONS

Article I, clause 8, of the Constitution:

> The Congress shall have Power. . . To regulate Commerce. . . among the several States. . . .

Article VI of the Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the Constitution:

> Congress shall make no law. . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment to the Constitution:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Nevada Revised Statutes § 645.190(2):

> The [real estate advisory] commission . . . may from time to time adopt reasonable regulations for the administration of this chapter.

REGULATION INVOLVED

Section VII(4) of the Rules and Regulations of the Real Estate Advisory Commission:

> Any broker who operates under or uses a franchise name shall:
>
> a. register such franchise name with the division on a form to be supplied by the division; and

b. incorporate in the franchise name and logotype his own name; however, the broker's name may not be less than 50 percent of the surface area of the entire combined area of both the broker's name and the franchise name or logotype; and

c. conspicuously display on or in all his advertising, and on his letterhead, deposit receipt forms, listing agreements and other printed materials generally available to the public a statement to the effect that his real estate brokerage office is independently owned and operated.

For the purposes of this section, the term "broker's name" is that name which appears on the real estate broker's license granted by the Nevada Real Estate Division.

STATEMENT OF FACTS AND NATURE OF THE CASE

This matter was heard by the lower court on cross-motions for summary judgment. The pleadings, depositions, affidavits, and other papers filed in support of the motions provide the following history.

In June of 1975, the Nevada Real Estate Advisory Commission (Commission), five members composed of licensed real estate brokers appointed by the governor held a public meeting during which real estate franchising was first discussed and considered. This matter was subsequently discussed at public meetings over a ten-month period from June, 1975 until March, 1976. During those meetings, extensive public input was obtained regarding real estate franchising. Representatives of appellant Century 21 Real Estate Corporation (Century 21) appeared at the hearings and presented Century 21's position and views concerning real estate franchising. Counsel for Century 21 met with counsel for the Nevada Association of Realtors, the commission, and the Real Estate Division (Division) to discuss proposed regulations. As a result of the hearings and meetings, the regulation at issue was adopted on March 30, 1976.

In essence, and as found by the lower court, the regulation in issue requires franchised real estate brokers to give their names at least equal and not less space than that of their franchisor's in all advertisements. This appeal challenges the constitutionality of that regulation on the various grounds set forth above.

PROCEEDINGS BELOW

On July 19, 1976, appellants filed a complaint in the United States District Court for the District of Nevada seeking injunctive relief against enforcement of section VII(4) of the Rules and Regulations.

A three-judge court was convened, and the parties filed cross-motions for summary judgment. On April 12, 1978, the court below granted summary judgment in favor of appellees. 448 F.Supp. 1237 (D. Nev. 1978)

Appellants filed a motion for reconsideration contending that summary judgment was inappropriate and that the court had failed to consider an issue concerning alleged bias of the commission against appellants. The court rejected these arguments on June 28, 1978, by denying the motion for reconsideration (App. A, p. 10a-12a) and entering judgment for appellees. (App. B, p. 13a).

ARGUMENT

I

This Appeal Should Be Dismissed or Affirmed Because the Questions Raised In the Appeal are not Substantial

Appellants contend that Section VII(4) of the Rules and Regulations of the Real Estate Advisory Commission of the State of Nevada is repugnant to constitutional guarantees of free speech, equal protection, and due process, that the regulation is pre-empted by the Lanham Act, 15 U.S.C. Sec. 1051 et seq., and that it imposes an unconstitutional burden on inter-state commerce. This Court has very early and has since very consistently held that if questions raised on an appeal are devoid of merit or have been foreclosed by decisions of the Court as to leave no room for a real controversy, a motion to dismiss an appeal will prevail. Similarly, this Court has held that a judgment of a lower court will be affirmed on motion where the questions urged on appeal are plainly foreclosed by decisions of the Supreme Court so as to make further argument unnecessary. Those decisions of the Court which foreclose further argument and leave no room for real or substantial controversy as to the issues raised by the appellants are discussed in the arguments which immediately follow.

A

The Regulation Does
Not Intrude Upon or Inhibit
any First Amendment Freedoms

Appellants assert that Section VII(4) of the Rules and Regulations of the Real Estate Advisory Commission violates appellants' First Amendment freedoms. This contention was rejected by the lower court which recognized that the regulation does not regulate speech content as such but rather merely requires the physical format of the communication to adhere to certain standards. 448 F.Supp. 1237, 1239-40. The Court properly found that the regulation in no way suppressed free speech because the content of the commercial message transmitted by Century 21's advertisement was not effected in any manner whatsoever.

Appellants contend that the lower court refused to consider whether less restrictive alternatives were available. The lower court was correct in concluding that the "least restrictive alternative" test is inapplicable to ". . . regulations which are designed to combat misleading or deceptive practices and which in no way threaten the commercial message with complete or total suppresion." 448 F.Supp. at 1240. In so holding, the Court correctly relied on Bates v. State Bar of Arizona, 433 U.S. 350 (1977) wherein the court held:

> ". . . The justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . overbreadth has been described by this court as 'strong medicine,' which, 'has been employed. . . sparingly and only as a last resort.' Broadrick v. Oklahoma, 413 U.S. at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. C.F. Bigelow v. Virginia, 421 U.S. at 380-381."

Appellants' reliance on U.S. National Soc. of Professional Engineers, 555 F.2d 978 (D.C. Cir. 1977) is severely misplaced. As was made clear by the Court the less intrusive alternative test which it applied pertained to regulations restricting expression of ideas concerning ethics and morality in business. Id. at 982. There, the Court struck down a District Court's order requiring the Society to affirmatively state that price fixing is unethical. In Beneficial Corp. v. F.T.C., 542 F.2d 611 (3rd Cir. 1976), cert. denied, 430 U.S. 983, the Court stated that a Commission order prohibiting the words instant and refund from being used in the same advertisement regardless of context constituted a prior restraint which was overbroad in that it failed to give any consideration to the various

contexts in which the words might be used. The court properly felt that the deception created by the use of the words might be cured if the words were presented in an appropriate context. Thus, unlike the regulation at issue here (which is a time, place and manner restriction) the regulation in Beneficial Corp. concerned itself with absolute and total suppression of speech content. It is interesting to note that the alternative to total suppression suggested by the court was arrangement in a more appropriate physical format, which is precisely the remedy employed by the Commission in enacting the regulation under attack here. Anderson, Clayton & Co. v. Washington State Dep't. of Agric., 402 F.Supp. 1253 (W.D. Wash. 1975), similarly involved a total or absolute suppression of speech content and is not apposite here. Finally, none of the cases cited by appellants were informed by the most recent pronouncements of this Court on the scope of First Amendment protection afforded to commercial speech. This Court's decisions in Ohralik v. Ohio State Bar Association, 98 S. Ct. 1912 (1978), and In Re Primus, 98 S. Ct. 1893 (1978), clearly and unequivocally delineate the differences in the scope of First Amendment protection afforded to commercial and non-commercial speech.

Both cases focused on the constitutionality of State restrictions on attorney solicitation. In In Re Primus, 98 S. Ct. 1893 (1978) the Court held that in the area of political expression or association, the Court will not tolerate the degree of imprecision that it would tolerate in the area of governmental regulation of purely commercial activity:

> "At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply 'propose[s] a commercial transaction,' Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973). See Ohralik, ___ U.S. ___, 98 S.Ct. 1912. In the context of political expression and association, however, a State must regulate with significantly greater precision." 98 S.Ct. at 1908.

In a footnote, the Court acknowledged the purpose or motive of the speaker is not normally central to the First Amendment question, but that motive does bear on the distinction between conduct that is "an associational aspect of 'expression' . . . and other activity subject to plenary regulation by government." 98 S. Ct. 1908 n. 32. Finally, the Court in In Re Primus, reaffirmed its previous holdings in Bates v. State Bar of Arizona, 433 U.S. 350 and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, that the State is still free to regulate speech by fashioning reasonable time, place and manner restrictions. 98 S. Ct. at 1908. In Ohralik, the Court held that its prior opinions in the commercial speech area "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." 98 S. Ct. at 1918. In Ohralik the Court carefully distinguished the plaintiff's asserted First Amendment freedom of solicitation from First Amendment free political or associational expression deserving of greater protection. As a result, the Court reaffirmed its earlier holdings that the State does not lose power to regulate commercial activity

deemed harmful to the public merely because speech is a component of that activity. The Court acknowledged that although purely commercial speech is not entirely removed from First Amendment protection, "it lowers the level of appropriate judicial scrutiny." 98 S. Ct. at 1919. Thus, in accordance with the holding in Primus, the Court held that the State could adopt a prophylactic rule in a commercial context restraining speech activity in order to prevent harm before it occurs without any showing of actual injury and reaffirmed its earier Bates holding that application of overbreadth analysis (which appellants request this court to engage in) applies weakly, if at all in the ordinary commercial context. Id. at 1922 n.20. The prophylactic rule at issue here should be similarly and summarily affirmed as against appellants' contention that the Board should be required to demonstrate that each individual sign submitted for approval is misleading or deceptive. As made clear in appellants' brief, there is no contention made in this case, nor can there be, that the First Amendment freedom asserted by appellants is anything other than "purely commercial speech" relating completely and exclusively to a proposed business transaction. As such, the level of judicial scrutiny is commensurately relaxed so as to permit prophylactic rules of the type and genre at issue here

without any showing of "actual deception in each case."

Finally, and most importantly, it is abundantly clear that the rule under attack here does not regulate the content of speech in any way but is rather a reasonable time, place and manner restriction which has never been held to violate First Amendment guarantees, even in the non-commercial context. Under the rulings set forth in Primus and Ohralik, the judgment of the lower court should be summarily affirmed or in the alternative, appellants' appeal should be summarily dismissed.

B

The Court Below Utilized a Proper Standard of Review In Testing the Constitutionality of the Regulation

Appellants contend that the Court below tested the constitutionality of the regulation under an impermissible "reasonableness" standard. Appellants cite Ohralik, supra, for the proposition that at the least, a regulation restricting commercial speech must implement an important state interest. Appellants' argument is based on a fundamental misapprehension of the

First Amendment analysis employed by the lower court. As is made clear in the opinion itself, the lower court merely held that the regulation constituted a reasonable and legitimate means of implementing the "legitimate and important end of ensuring that the public realizes it is doing business with an independent broker and not a national firm when it buys or sells real estate in Nevada." 448 F.Supp. at 1240. Thus, the lower court did hold that the interest of the state was important, which is sufficient under the test set forth in Ohralik, supra, which states that commercial speech is subject to regulation in furtherance of important state interests. 98 S. Ct. at 1920. The means of implementing the state's purpose must, of course, be reasonable. Appellants' implied contention that something more is required is merely a disguised restatement of their previous contention that the "less intrusive alternative test" is an aspect of First Amendment analysis in the purely commercial speech context. This Court's recent decisions in Ohralik and Primus thoroughly dispose of this aspect of appellants' argument in that they reaffirm numerous previous holdings of this Court that states are free to fashion "reasonable restrictions with respect to the time, place and manner" of commercial and non-commercial speech. In Re Primus, 98 S. Ct. 1893, 1908.

Appellants also contend that the lower court erred by failing to balance the competing interests of the parties. The opinion, however, reflects a careful balancing of competing interests. The Court found that the state has a substantial interest in protecting consumers from false or misleading advertising. 448 F.Supp. at 1239, 1240. Against the state's interest, the lower court balanced the free speech interests of Century 21 and found that this interest was not unconstitutionally infringed upon at all:

> ". . . the plaintiffs here do not allege that the regulation makes it infeasible to advertise in Nevada; they complain only that it makes it more expensive." 448 F.Supp. at 1240.

Thus, the Court correctly found that the interests of the state in protecting the public from misleading and deceptive advertising clearly outweighed appellants' asserted right to be free of mere economic burden.

C

The State's Interest In Preventing Deceptive Advertising Predominates Over Appellants' Right to Be Free of Mere Economic Burden

Appellants argue that the private interest of Century 21 predominates over the interest of the public to be protected from misleading and deceptive trade practices. The lower court disagreed and concluded that the state's interest "in keeping false or deceptive advertising from consumers is substantial" and also found that nothing in the regulation prevents Century 21 from preserving the visual impact of its 80:20 format by using filler messages . . . to take up the space ordinarily used to display the franchisee's name." 448 F.Supp. at 1240.

Appellants contend that they are "a vehicle through which consumers of realty are aided in their right to receive relevant communications." (Appellants' Jurisdictional Statement, p. 14). Appellees accept this premise, however, the societal interest in "the free flow of commercial information," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S., at 764, is in no way affected by the regulation requiring

the 50:50 format. The regulation is merely an attempt to more effectively apprise the consumer of the franchisee's independent status which the consumer should be aware of and certainly has a right to know. 425 U.S. 756-757.

Appellants contend that the consumer was not "left in the dark as to the broker's identity" prior to the enactment of the regulation in question. (Jurisdictional Statement, p. 15). This may be true in some instances, while the consumer may still be misled or "left in the dark" as to the relationship between the broker and Century 21. The regulation is merely an attempt to cure that deficiency. As the three judge panel held: "The regulation. . . merely requires that the franchisee's independent status be proclaimed in tones as loud as those used to advertise the franchisor-franchisee relationship." 448 F.Supp. at 1239. Thus, as to this aspect of the case, the lower court's opinion should be summarily affirmed, or in the alternative, appellants' appeal on this ground should be summarily dismissed.

D

The Regulation has a Rational Basis and Implements a Legitimate State Interest

Appellants contend that the regulation at issue violates the Fourteenth Amendment in that it does not promote a legitimate state interest. The lower court held that "the 50:50 rule constitutes a legitimate means to the legitimate and important end of insuring that the public realizes it is doing business with an independent broker and not a national firm when it buys or sells real estate in Nevada." 448 F.Supp. at 1240. The 50:50 rule unequivocally provides the consumer with a measure of self-protection by guaranteeing that he will be able to easily identify the broker with whom he is dealing and assess as best he can his particular reputation for honesty and fair dealing. Appellants assert that the 50:50 rule in no way informs the public as to the legal relationship between the franchisor and the franchisee. It cannot be disputed, however, that the regulation correctly assists and aids the consumer in understanding that he is dealing primarily with an independent local broker rather than with a national firm when he engages that broker's services. Thus, the regulation undoubtedly makes the consumer

more aware of the independent status of the local broker, and therefore fully implements its intended purpose. Thus, as to this ground for appeal, the opinion of the lower court should be summarily affirmed, or in the alternative, the appeal should be dismissed.

In addition, appellees urge this Court to dismiss this aspect of appellants' appeal pursuant to Supreme Court Rule 16(b) which states that the Court will receive a Motion to Dismiss if the federal question sought to be reviewed was not timely or properly raised, or expressly passed upon. The record reflects that appellants failed to raise this contention below and as is made clear in the opinion itself, the Court obviously did not consider or expressly pass upon it.

E

The Regulation Does Not Establish a Conclusive Presumption in Violation of Due Process

Appellants devote two paragraphs to their argument that the 50:50 rule constitutes a "conclusive presumption" which violates the Fifth and Fourteenth Amendments to the United States Constitution in that it presumes "that the use of a sign on which the franchisor's trade name is larger than that of the

local broker is deceptive." Appellants' argument brings to fruition the spectre first preceived by Justice Burger in his dissent in Vlandis v. Kline, 412 U.S. 441, that some persons would misconstrue that opinion and conclude that a "close judicial scrutiny" test had been engrafted onto the due process clause whenever something resembling an irrebuttable presumption was in issue. As noted by one recent commentator, the Vlandis opinion might be misconstrued by some to suggest that a statutory classification might be unconstitutional whenever the legislative presumption underlying it is not necessarily or universally true in fact. This type of misapplication and misconstruction of the Vlandis opinion would render almost every legislative enactment unconstitutional because the underlying statutory presumption or postulate that is necessarily or universally true is extremely rare. Note, The Conclusive Presumption: Equal Protection or Due Process, 72 Mich. L. Rev. 800, 830 (1974). As observed by Justice Burger in Vlandis, and by the foregoing commentator, "conclusive presumption" analysis of this sort would strike down Kansas' debt adjusting law, which was upheld in Ferguson v. Skrupa, 372 U.S. 726 (1963), state laws requiring graduation from an accredited law or medical school prior to engaging in those professions, income cut-offs for welfare eligibility, traffic speed

limits, and Section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78 (p)(b) (1970), which presumes insider trading when a corporate director, officer, or shareholder of ten percent (10%) of the stock buys and sells securities of its corporation within six (6) months. Scholars of the "irrebuttable presumption" doctrine correctly perceive that the doctrine is a strange hybrid of due process and equal protection scrutiny which can be applied to almost any legislative enactment:

> "Once a Court determines the purpose toward which a classification is directed, it can always rephrase the statute as an irrebuttable presumption. And since nearly all classifications contain some measure of inaccuracy, very few acts of legislation could survive the test of 'necessarily or universally true in fact' promulgated by irrebuttable presumption cases. Thus, this new basis for judicial intervention appears to have remarkably wide-ranging applicability." Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1539, 1549 (1974).

Appellants' "conclusive presumption" analysis stems from a patent misconstruction and misapprehension of the Vlandis line of cases. Appellants' real concern is not whether they belong to the legislative classification, since all realtors are compelled to join in the class, but whether the classification (50:50 ratio requirement) is rationally related to some permissible state purpose. 87 Harv. L. Rev. at p. 1547.

This Court has more recently limited the "conclusive presumption doctrine" to specifically avoid the type of misapplication urged by appellants herein. In Weinburger v. Salfi, 422 U.S. 749 (1977), cited by appellants, the Court cleared up much of the confusion generated by irrebuttable presumption analysis. There, the Court observed that a statute providing for a nine (9) month durational marriage requirement prior to social security entitlement did not speak in terms of the Bona Fides of the marriage relationship and then make evidence of that relationship inadmissible, (although one of the stated purposes of the statute was to prevent the use of sham marriages to secure added benefits), but rather set forth an objective criterion which the legislature considered sufficiently related to the underlying purpose to be used as a test. The Court correctly observed in that case that appellants were "completely free to

present evidence that they met the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it could be used to deprive them of benefits available to those who did not satisfy the test." As in Weinberger, the regulation at issue here creates no "conclusive presumption" since it merely sets forth an "objective criterion" which the Commission considered to be rationally and reasonably related to its concededly legitimate state purpose. As in Weinberger, appellants' only constitutional claim is that the regulation is not so rationally or reasonably related to its espoused legislative purpose to pass constitutional muster. As to this question, the Supreme Court has enunciated the following standard:

> "[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in Mourning, supra. Nor is the question whether the provision filters out a

> substantial part of the class which caused congressional concern, or whether it filters out more members of the class than non-members. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." 422 U.S. at 777.

In Knebel v. Hein, 429 U.S. 288 (1977), the Court held that a state welfare regulation which treated transportation expenses as income for purposes of determining the discount to which a food stamp recipient was entitled when purchasing stamps created no irrebuttable presumption. In view of the purpose of the statute, which was related to the food purchasing power of recipients, the Court observed that it might have been more equitable to define income so as to allow a corresponding deduction for the transportation expenses, but that the availability of such alternatives did not render the statute invalid because the regulation

was nonetheless still rationally related to its purpose. In its conclusion the Court held that the regulation embodied no conclusive presumption but merely represented a reasonable legislative judgment on legitimate legislative concerns. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court similarly refused to employ "irrebuttable presumption" analysis urged by the appellants therein. A one- year residency requirement for obtaining a divorce was challeged by the appellants in that case as creating an irrebuttable presumption. The purpose of the statute was to insure that a party seeking a divorce had some modicum of attachment to the state. Rather than engage in Vlandis irrebuttable presumption analysis to require individualized determination of "attachment," the Court distinquished Vlandis on the ground that the Iowa statute set forth an absolute durational requirement which would have excluded the appellant whether or not she could successfully demonstrate "physical presence coupled with intent to remain in Iowa." It is also significant to note that the property or liberty interest asserted in Sosna, supra, is regarded as a fundamental interest. Boddie v. Connecticut, 401 U.S. 371

(1971). The Nevada regulation under attack here is similarly phrased in terms of an absolute and requires no individualized showing of deception or fraud as to particular signs.

In Mourning v. Family Publication Service, 411 U.S. 356 (1973), the Court sustained the constitutionality of a regulation under the Truth In Lending Act which made the Act's disclosure provisions applicable whenever credit is offered to a consumer for which either a finance charge is or may be imposed, or which is payable in more than four installments. The regulation was challenged because it was said to conclusively presume that payments made under an agreement providing for more than four (4) installments necessarily included a finance charge, when, in fact, that might not be the case. The Court rejected this irrebuttable presumption challenge and stated:

> "The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but, rather imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." Id. at 377.

The regulation under attack here is a similar type prophylactic measure intended to prevent deception and to assist, aid, and educate the consumer who is likely to be misled or deceived by franchisor advertising. As in Mourning, the rule does not presume that absolutely all advertising in a ratio less than 50:50 is deceptive, but rather imposes a 50:50 requirement on all members of the defined class in order to eliminate deception of the type and genre contemplated by the regulation and to educate and assist the consuming public by requiring realtors to provide them with additional information in a manner designed to result in actual and accurate comprehension.

Finally, in Ohralik v. Ohio State Bar Association, 98 S. Ct. 1912 (1978), the Court upheld an Ohio regulation proscribing solicitation by attorneys against the contention that none of the evils justifying enactment of the regulation were found to be present in the appellant's case. In its conclusion the Court identified the fallacy of appellant's assumption that nothing less than actual proven harm would be a sufficiently important state interest to justify disciplining the attorney:

> "Appellant's argument misconceives the nature of the state's interest. The rules prohibiting solicitation are

> prophylactic measures whose objective is the prevention of harm before it occurs. The rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the state seeks to avert. In such a situation . . . the state has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed." 90 S.Ct. at p. 1923.

As in Ohralik, supra, the regulation challenged here is a prophylactic measure designed to prevent harm before it occurs in a situation where the state thinks it likely that harm would occur in the absence of such a rule. Under the cases more recently decided by this Court, this is sufficient to sustain the regulation under "irrebuttable presumption" analysis. As a result, the lower court's opinion as to this ground for appeal should be summarily affirmed, or in the alternative, appellants' appeal should be summarily dismissed.

F

Legislative Bias Does Not Obtain in This Case and in Any Event Would Not Be Sufficient To Overturn The Regulation

Appellants assert that the Commission members were biased against them when they enacted the regulation in issue and that as a result their Fourteenth Amendment rights have been violated. The lower court rejected this argument stating:

> "With respect to an agency's legislative as opposed to adjudicative acts. . . there is 'no federal constitutional requirement that legislators and rule makers must be free of bias or interest.' Wall v. Am. Opt. Ass'n., Inc. 379 F.Supp. 175, 180 (N.D. Ga. 1974), aff'd mem. 419 U.S. 388 (1974) (emphasis in original). See Rogers v. Friedman 438 F.Supp. 428, 433, (E.D. Tex. (1977) cert. granted, ___ U.S. ____ (1978)." (App. A. p.11a).

In Wall, supra, nine (9) optometrists challenged rules proposed by a board of optometrists on the ground that the board had an economic interest in the promulgation of the rules. That Court denied relief and validated the rules

on the grounds that there is no federal constitutional requirement that rule makers must be free of bias or interest. Thus, Wall summarily rejected the precise issue raised by appellants herein.

The distinction drawn by the lower court between a tribunal's legislative and adjudicative functions has been observed in many other cases. In Hortonville Dist. v. Hortonville Ed. Assoc., 426 U.S. 482 (1976), the Court rejected the petitioners' contention that their due process rights were violated when a school board terminated their employment for participating in a teachers' strike prohibited by state law The petitioners argued that the board could not operate as a fair and impartial tribunal because it participated in unsuccessful teacher negotiations prior to the incident and had learned about the reasons for the strike in the course of those negotiations. In rejecting this contention, the Court stated in part:

> "The Board's decision. . . to dismiss striking teachers involves broad considerations, and does not. . .turn on the Board's view of the 'seriousness' of the teachers' conduct. . . It was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy: what choice among the alternative responses to the teachers' strike will best serve the interest

> of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it?" 426 U.S. at 495.

The question before the Real Estate Advisory Commission of the State of Nevada was similarly charged with weighty considerations of public policy affecting groups having dissimilar interests. Their resolution of these competing policy considerations was a legislative function not subject to judicial review on grounds of bias.

In American Telephone and Telegraph Co. v. FCC, 449 F.2d 439 (2d. Cir. 1971), the Court held that the petitioners' due process rights were not violated by the FCC when it permitted staff members who had taken positions adverse to the petitioners at the rule making hearing to participate in the rule making decision on the ground that the proceedings in issue were rule making and not adjudicatory. Accord, Hoffman-La Roche Inc. v. Kleindienst, 478 F.2d. 1 (3rd Cir. 1973). Kenneth Culp Davis described the important distinction between the legislative and adjudicatory function of administrative tribunals at 2 Davis, Administrative Law Treatise, Section 1202 (West 1958), and concluded that adjudicators should be impartial, but that administrators should be

selected from those whose actual biases are favorable to the policies underlying the enabling statute. Thus, with respect to the Commission's legislative or rule making function, which is at issue here, the authorities approve of bias in favor of implementing those policies which the Commission is constituted to protect and advance. This is the only type of bias of which appellees are guilty.

Furthermore, it should be noted that the record before the Court reflected that the Commissioners were not in competition with Century 21 nor could they be since neither Century 21 Real Estate Corporation nor Century 21 Real Estate of Nevada, Inc., were engaged in the real estate brokers business in the State of Nevada at the time the regulation was enacted. Appellant Southern Nevada Franchise Service Company, Inc., was not then nor has it ever been engaged in the real estate business. Appellant Robert E. Barrett and Barrett & Company, Inc., were engaged in the real estate brokers business in the southern portion of the State of Nevada. Appellees Hass, Fuetsch and Schultz were and are residents of northern Nevada and have their places of business approximately 420-450 miles from the place of business of appellant Robert E. Barrett. Thus, only two of the appellees, Krolak and

Silvagni were technically competing with only one of the appellants, that being Robert E. Barrett and his company in Las Vegas, Clark County. The degree of competion was, moreover, extremely diluted in that the record before the Court reflected that there were approximately five hundred two (502) licensed Nevada real estate brokers in Clark County. Thus, though not relied upon by the Court, there certainly was no factual evidence in the record that would reflect any actual bias on the part of any of the Commissioners.

G

The Regulation is Not Preempted by the Lanham Act

Appellants contend that the lower court's analysis of the Lanham Act's relationship to the regulation was in error in that the lower court utilized an improper test to determine whether preemption had occurred. In Florida Lime and Avocado Growers, Inc. v. Paul 373 U.S. 132 (1963), the Court stated that the test of whether both federal and state regulations may operate, or whether a state regulation must give way, is whether both regulations can be enforced without impairing federal superintendence of the field, and not whether they are aimed at similar or different objectives."

Appellants suggest that the lower court adopted the test repudiated in Paul by virtue of the lower court's conclusion that the purposes underlying the Lanham Act were not impeded or intruded upon by the regulation in question. Once again, appellants exhibit a fundamental misapprehension of the Court's opinion. As was made clear in the opinion itself, the language seized upon by the appellants respecting the purposes of the Lanham Act answered the appellants' supremacy clause challenges and not their preemption challenge. 448 F.Supp. at 1241. With respect to appellants' preemption attack, the Court merely held that the Lanham Act contains no manifestation of a congressional intent comprehensively to control all aspects of the trademark field and that the state regulation at issue would not collide with any of the policies or provisions set forth in that act. This is precisely the test established by this Court to determine whether any particular field has been preempted by federal law. In Ray v. Atlantic Richfield, et. al., 46 L.W. 4200 (1978), this Court reviewed the preemption doctrine and confirmed its earlier holdings that when a state exercises its police power in an area it is presumed not to be superseded by federal law unless that was the clear and manifest purpose of Congress when enacting that law. As stated in Ray, that purpose may

be evidenced by a scheme of federal regulation which is so pervasive as to make reasonable the inference that Congress left no room for state supplementation, or by regulation in a field in which the federal interest is so dominant that the federal system will be assumed to preclude supplemental state regulation, or by express congressional fiat. 46 L.W. at 4201. Preemption deriving from federal legislation must take the form of an unambiguous congressional mandate, and where no such mandate is evident, the court will not find preemption. Additionally, courts have been especially reluctant to find an attempt to preempt where state legislation has been enacted to protect the public health and welfare. See Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). The regulation in issue here clearly represents an exercise of Nevada's police power to protect the welfare of its citizens. Inasmuch as the Lanham Act, 15 U.S.C. Sec. 1051 et seq. (1970), expresses no explicit or implicit purpose to occupy the field and foreclose concurrent or supplemental state legislation, the lower court's holding in this respect should be summarily affirmed, or in the alternative, appellants' appeal as to

this ground should be summarily dismissed. See also, Mariniello v. Shell Oil Co., 511 F.2d 853 (3rd. Cir. 1975), and Golden Door, Inc., v. Odishi, 437 F.Supp. 956 (N.D. Ca. 1977), both of which held that the Lanham Act does not preempt concurrent state regulation. Cf. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973).

Appellants' supremacy clause challenge should also be summarily dismissed. In Ray, supra the Court acknowledged that even where Congress has not preempted the field, a state statute would be held void where compliance with both federal and state regulation is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 46 L.W. at 4202. Thus, the congressional purpose analysis engaged in by the lower court was demanded by appellants' supremacy clause challenge and was correctly resolved by the Court when it found that the regulation does not in any manner dilute Lanham Act protection and otherwise fully comports with the policies and purposes sought to be implemented by that Act. 448 F.Supp. at 1241.

H

The Lower Court Properly Resolved Appellants' Commerce Clause Contentions By Summary Judgment

Appellants' final contention on appeal is that the Court should not have resolved their commerce clause contentions on Motion for Summary Judgment but should have afforded them further opportunity to develop additional facts at an evidentiary hearing. This contention does not raise a substantial federal question. Appellants do not contend that the lower court did not consider facts adduced by the parties in reaching its conclusion or that the Court utilized an improper test in resolving the question, or that it improperly applied the law. Appellants merely suggest that they have additional facts not presented to the Court which may have some bearing on the question of the proper balance to be struck. Appellants offer no reason why such facts could not have been presented to the Court and why they were not so presented. The Court properly found that there were no genuine issues of material fact in dispute. Appellants do not contest this but merely set forth in their brief a number of purported "fact issues" which appellants could have but did not place in issue which they contend should be and perhaps would be adduced at an evidentiary hearing. F.R.C.P. Rule 56 clearly and unequivocally rejects this line of

reasoning as a basis for overturning the granting of a Motion for Summary Judgment. F.R.C.P. 56(e) provides that when a Motion for Summary Judgment is made and supported as provided in the rule, an adverse party must, by his response, by affidavits or as otherwise provided in the rule, set forth specific facts showing that there is a genuine issue for trial. The rule states that if he does not so respond, summary judgment, if appropriate, shall be entered against him. Long before this provision was added to Rule 56, it was held that a party opposing a Motion for Summary Judgment does not have the right to withhold evidence until trial, nor can he demand a trial based on an asserted speculative possibility that a material issue of fact may appear at that time. See, Maderense Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d. Cir. 1945) cert. denied 325 U.S. 861. ("[T]he ruling is to be made on the record the parties have actually presented, not on one potentially possible.") F.R.C.P. 56(f) provides that a party opposing a Motion for Summary Judgment may be relieved from his F.R.C.P. 56(e) obligations by filing an affidavit that he cannot, for various reasons, present by affidavit facts essential to justify his opposition. In such circumstances, the court may deny a Motion for Summary Judgment, order a continuance, or permit additional discovery to be taken. F.R.C.P. 56(f) and F.R.C.P. 56(g) are

intended to be complementary provisions. Consequently, when a moving party has met the initial burden required for the granting of a summary judgment, the opposing party either must establish a genuine issue for trial under Rule 56(e) or explain why he cannot yet do so under Rule 56(f). Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); 10 Wright & Miller, Fed. Practice and Procedure, Section 2740 at p. 724 (West 1973). Since appellants failed to present any genuine issue of material fact to the court pursuant to F.R.C.P 56(e), and did not present a Rule 56(f) Affidavit explaining their reasons for failure to do so, they cannot now be heard to complain on appeal.

1. The Court Properly Balanced the Interests at Stake.

Despite appellants failure to preserve this issue for appeal pursuant to Supreme Court Rule 16, it nevertheless clearly appears that the lower court correctly applied the balancing test to the facts that were properly before it and found that the balance weighed rather significantly in favor of the state. In City of Philadelphia, et al. v. State of New Jersey, et al., 46 L.W. 4801 (1978), this Court examined many of its previous commerce clause holdings and concluded that per se rules apply to state regulations effecting a form of economic protectionism, but that a much more flexible approach applies where other

legislative objectives are credibly advanced and there is no patent discrimination on interstate commerce.

In Pike v. Bruce Church, Inc., 397 U.S. 137, this Court held that where a statute regulates even-handedly and effectuates a legitimate local concern, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. The lower court properly utilized this test and held that it was unable to perceive any burden on interstate commerce whatsoever since the regulation at issue was directed principaly at the local level and affected only intrastate advertisements. While the court acknowledged that appellants prepared advertisements for interstate distribution, the court correctly observed that the Nevada regulation did not impede or impair that distribution in interstate commerce. The court also observed that the regulation did not discriminate against interstate commerce by requiring national franchisors to forbear from advertising in Nevada or cause them to otherwise lose any advantages that inure to them as franchise operations. On the other hand, the court found that combatting fraudulent or deceptive advertising in the real estate brokers business was a matter of extensive

state regulation and of peculiary local concern. 448 F.Supp. at 1242. Elsewhere, the court found that the regulation implemented an important and substantial state interest in ensuring that the public realizes it is doing business with an independent broker and not a national firm when it buys or sells real estate in Nevada, and that at most the regulation makes it more expensive for appellants to place their advertising in this State. Under these circumstances it is difficult, if not impossible to perceive any error in the court's conclusion that whatever incidental burden on interstate commerce may be imposed by the regulation, it is very slight in comparison with the weighty state interest involved. 448 F.Supp. at p. 1242. As a result, the lower courts opinion in this respect should be summarily affirmed or in the alternative, appellants appeal should be summarily dismissed.

CONCLUSION

For all the reasons set forth immediately above, appellees respectfully request this Court to dismiss this appeal, or in the alternative, to affirm the judgment and order below on the ground that this appeal does not present a substantial federal question and raises certain

issues which were not presented to the lower court.

Dated this 20th day of December, 1978.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CENTURY 21 REAL ESTATE CORPORATION, et al.,
Plaintiffs,

vs.

THE NEVADA REAL ESTATE ADVISORY COMMISSION, et al.,
Defendants.

Civil No. 76-136 BRT

Order

Pursuant to Rule 59(e), Fed.R.Civ.P., the plaintiffs have timely moved this Court to reconsider its order, dated April 12, 1978, granting summary judgment in favor of the defendants. They advance a number of arguments in support of their motion. Simply stated, however, these arguments comprise two basic attacks on the judgment: (1) that there exist material issues of disputed fact which preclude the grant of summary judgment; and (2) that this Court failed to resolve all claims for relief, rendering the judgment interlocutory and non-appealable unless certified under Rule 54, Fed.R.Civ.P.

The record in this case was very complete, consisting of numerous depositions, affidavits, exhibits and interrogatories. In reviewing them, this Court has been mindful of its obligation to avoid deciding constitutional and other questions of a large public import on an inadequate factual basis. See 6 Pt. 2 Moore's Federal Practice ¶ 56.17 [10] (2d ed. 1976). However, "the existence of an important, difficult or complicated question of law, where there is no genuine issue of material fact, is not a bar to a summary judgment." Id. at ¶ 56.16, p. 56-661 (footnote omitted). Having reread the record in passing on the plaintiffs' mo-

tion, this Court remains convinced that there exist no *material* issues of fact to preclude summary judgment.

For the purpose of placing at rest plaintiffs' complaint that our first opinion did not dispose of all claims for relief, the opinion filed April 12, 1978, is hereby amended to add the following:

The plaintiffs also argue on the basis of *Gibson v. Berryhill*, 411 U.S. 564 (1973) that the rule cannot stand because promulgated by an impermissibly biased agency. *Gibson* represents only a logical extension of the fundamental rule that one accused of violating the law is entitled to a fair trial before a fair tribunal, be that tribunal a jury, a judge or an administrative body entrusted with adjudicative authority. With respect to an agency's legislative as opposed to adjudicative acts, however, there is "*no federal constitutional* requirement that legislators and rule makers must be free of bias or interest." *Wall v. Am. Opt. Ass'n, Inc.*, 379 F. Supp. 175, 180 (N.D.Ga. 1974), *aff'd mem.* 419 U.S. 888 (1974) (emphasis in original). *See Rogers v. Friedman*, 438 F.Supp. 428, 433 (E.D.Tex. 1977) *cert. granted*, —— U.S. —— (1978). The plaintiffs expressly disavow any intention of attacking the state's delegation of rule making authority to the Commission. *Rite-Aid Corp. v. Bd. of Pharm. of New Jersey*, 421 F.Supp. 1161, 1169-70 (D.N.J. 1976). Nor have they pressed the claim that, apart from the general question of the regulation's validity, these particular defendants are so biased that they cannot constitutionally sit in judgment on plaintiff Barrett's violation of it. Indeed, it may be doubted if that argument would properly be before this panel at all, *see Rite-Aid Corp. v. Bd. of Pharm. of New Jersey, id.* at 1170 n. 18. Accordingly, the plaintiffs' *Gibson* claim must fail under the precepts of *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and its progeny. *Wall v. Am. Opt. Ass'n, Inc.*, 379 F.Supp. at 190-91.

In all other respects the motion for reconsideration is denied.

I Hereby Certify that all three members of this three-judge Court have concurred in the foregoing order.

Dated June 27, 1978.

/s/ Bruce R. Thompson
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CENTURY 21 REAL ESTATE CORPORATION, et al.,
Plaintiffs,

vs.

THE NEVADA REAL ESTATE ADVISORY COMMISSION, et al.,
Defendants.

Civil No. 76-136 BRT

Summary Judgment

In consideration of the Opinion filed April 12, 1978, and the order amending said opinion filed concurrently herewith,

IT HEREBY IS ORDERED, ADJUDGED and DECREED that the action entitled above be, and it hereby is, dismissed with prejudice.

DATED June 27, 1978.

/s/ BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

cc to Cnsl.

Dtd. 6-28-78

No. 78-683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CENTURY 21 REAL ESTATE CORPORATION; CENTURY 21 REAL ESTATE OF ARIZONA, INC.; SOUTHERN NEVADA FRANCHISE SERVICE CO., INC.; ROBERT E. BARRETT; AND BARRETT & CO., INC., REALTORS, *Appellants,*

v.

NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS; ELIZABETH M. KROLAK; FRED M. SCHULTZ; OLIVIA D. SILVAGNI; CARL F. FUETSCH; AND ANGUS W. MCLEOD, *Appellees.*

On Appeal from the United States District Court for the District of Nevada

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REPLY MEMORANDUM FOR THE APPELLANTS

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On Appeal from the United States District Court for the District of Nevada

REPLY MEMORANDUM FOR THE APPELLANTS

Several passages in the Appellees' Motion to Dismiss or Affirm require reply.

I

THE FIRST AMENDMENT

A. "Misleading or Deceptive Practices"

Stripped of its verbiage, the appellees' motion rests essentially on the power of the state to combat "mis-

leading or deceptive practices." *See* Motion of Appellees to Dismiss or Affirm at 10, 18, 19 & 43. *See also id.* at 15 ("prophylactic rule"). This argument is frivolous in the context of this case, for there is nothing which the appellants (or others in their situation) seek to do which is in any way misleading or deceptive. Even where, as is common in franchisor-franchisee advertising, the name of the franchisor is used exclusively—*e.g.,* Hilton hotels, H. & R. Block income tax service—this has never been held to be misleading. In contrast, here the name of the broker is asserted clearly, conspicuously, and legibly. Even if the consumer believes, despite that disclosure, that the franchisee is owned and operated by the franchisor,[1] there is no detriment to him. *See, e.g., Billups* v. *Magness Constr. Co.,* 391 A.2d 196 (Del. Sup. Ct. 1978) (franchisor can be held liable for franchisee's acts under apparent authority principles).

The argument based on misleading or deceptive practices is a smokescreen, and should be recognized as such.[2] The record shows no evidence of the public being misled or deceived. The motivation for the regulation is not protection of the public, but protection of local, non-franchised brokers from competition with brokers who choose to make a mutually favorable arrangement with franchisors. The regulation challenged

[1] Under both the Century 21 franchise agreement and the Rules and Regulations of the Nevada Real Estate Advisory Commission § VII (4)(c), a statement to the effect that the brokerage office is independently owned and operated is required in all advertising material. *See* Jurisdictional Statement at 4 & 11.

[2] The Nevada Attorney General issued an opinion letter on March 25, 1976, that explicitly concluded that no misstatement or misrepresentation is involved under the facts of this case. *See id.* at 7.

here is an arbitrary abridgment of the appellants' freedom of commercial speech and an unwarranted interference with the conduct of interstate business, as well as a direct infringement of the appellants' rights under the Lanham Act.

B. Time, Place, or Manner

The 50:50 rule established by the Nevada regulation does not qualify as a "time, place or manner" restriction. By its terms, it has nothing to do with time and place; nor can it be sustained as a valid restriction on the manner of expression. The state does not seek to control *conduct* incidental to speech, such as the volume of a loudspeaker, the raucous playing of a band, parade permits, or litter control. Rather, the acknowledged governmental interest is the supression of the very speech regulated.

Restrictions on time, place and manner have been upheld,

> despite [their] incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." [*Young* v. *America Mini Theatres, Inc.,* 427 U.S. 50, 79-80 (Powell, J., concurring), *quoting United States* v. *O'Brien,* 391 U.S. 367, 377.]

Here, as in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93-94, the alleged governmental interest is not independent of the speech in question. The 50:50 rule specifies how one particular

message must be communicated, and, in so doing, proscribes the use of the appellants' registered service marks. Thus, this is a case of state regulation which seeks to alter the symbol by which a business identifies itself to the consuming public on a multi-state basis.

The appellees argue that alteration of the physical format of communication does not relate to the content of that communication. But "content" is equivalent to "meaning," and uncontroverted testimony in the record indicates that consumer confusion will result from an alteration of the service mark in one state since it is a distortion of the meaning of the mark. This was recognized by Justice Frankfurter in *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U.S. 203, 205, where he said:

> The protection of trade-marks is the law's recognition of the psychological function of symbols. . . . Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is obtained, the trade-mark owner has something of value.

It is this psychological function and value of trademarks and service marks which the ratio rule distorts. *See Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983; *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608.

The appellees also place reliance on the conclusion of the court below that the regulation does not threaten Century 21's commercial message with complete or total suppression. But Century 21's message is embodied in its registered service marks, and when the

marks are altered in any noticeable respect, the consumer is confused and the message no longer has the same meaning.

Format is the essence of the trademark message. The 50:50 rule is as much a suppression of the meaning of the "CENTURY 21" service marks as would result from a regulation that "Coca Cola" must be printed only in Old English letters. The confusion in the public's mind would be akin to that engendered by altering the United States flag so that the blue field of stars occupied fifty percent of the flag's surface. If one saw such a flag over a public building, he would hardly conclude that it was an official government office.[3]

C. Less Restrictive Alternatives

The appellees contend that the less restrictive alternative analysis, which has been adopted by the Third and District of Columbia Circuits, but which was rejected by the court below, is inapplicable in the commercial speech context.[4] The appellees assert that the

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[3] Even if it were conceded that the 50:50 rule is a valid time, place, or manner regulation, it would still be necessary to determine whether there is a less restrictive alternative. As this Court said in *United States* v. *O'Brien*, 391 U.S. 367, 377, such restrictions can be "no greater than is essential."

[4] The attempt of the appellees to distinguish *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950; *United States* v. *National Society of Professional Engineers*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd on other grounds*, 435 U.S. 679; *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983; and *Anderson, Clayton & Co.* v. *Washington State Department of Agriculture*, 402 F. Supp. 1253 (W.D. Wash. 1975) (three-judge court), is unpersuasive. *See also Standard Oil Co.* v. *FTC*, 577 F.2d 653, 662 (9th Cir. 1978) (FTC order that

rejection of overbreadth analysis in *Bates* v. *State Bar of Arizona,* 433 U.S. 350, and the acceptance of a prophylactic regulation in *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, lead to that conclusion. This contention is unsound.

In *Bates,* this Court held that it would not invalidate a regulation simply because it potentially violated the First Amendment; a litigant would have to demonstrate that his own advertisement was entitled to First Amendment protection in order to be successful. *Id.* at 379-82. This is exactly what the appellants have done in this case. They have not argued a merely hypothetical case, but have presented a concrete situation for adjudication.[5]

In *Ohralik,* this Court did not even deal with, much less did it reject, a less restrictive alternative analysis. The holding there was that, in certain circumstances in the commercial speech context, the state does not have to follow the usual rule in First Amendment

went beyond what was necessary to deter unlawful conduct struck down on First Amendment grounds.) The decisions in those cases were premised upon the fact that the government had dictated what the private concern could or could not say or how it had to communicate a particular message.

That is exactly the situation here. The appellants are prohibited by Nevada from advertising in the 5:1 format. The holding of *National Society of Engineers, Beneficial,* and similar cases is simply that state infringement of freedom of communication, even in commercial speech, should be no greater than is reasonably necessary.

[5] In such a case, *Bates* suggests that the state has the burden to demonstrate the harm of the advertisement. 433 U.S. at 381-82; Canby & Gellhorn, *Physician Advertising: The First Amendment and the Sherman Act,* 1978 Duke L.J. 543, 553.

cases of proving actual harm. 436 U.S. at 462-68.[6] This holding, however, does not obviate the necessity of initially balancing the public and private interests at stake to determine whether the regulation can withstand constitutional scrutiny, as was done in *Ohralik. Id.* at 454-62. Nor does it undercut the holding of all the courts which have considered the issue, except the court below, that the state should not be allowed to sacrifice First Amendment rights needlessly by the failure to adopt less restrictive alternatives that are readily available.

II

THE FOURTEENTH AMENDMENT

The appellees assert (Motion, p. 22) that the question whether a rational basis or legitimate state interest exists to uphold the 50:50 rule was not raised in the court below. This is patently wrong. Paragraph II.b on page 8 of the Complaint reads, "The imposition of a 50:50 advertising ratio by subsection (b) of said [regulation] is not in pursuance of a legitimate state interest and is wholly without a rational basis, thus depriving plaintiffs of due process of law." Moreover, the appellants requested summary judgment on the basis of the Fourteenth Amendment and emphasized this aspect of the case in their supporting brief of supplemental points and authorities and in their motion for reconsideration of the initial opinion. The summary

[6] *See also In re Primus,* 436 U.S. 412, 437-38. It is important to note that neither *Ohralik* nor *Primus* held that proof of actual harm was never required in the commercial speech context. Indeed, the appellants contend that such proof is required under the facts of this case.

judgment entered by the court below of necessity dealt with this issue, and, as a result, it is properly before this Court.

III

THE LANHAM ACT AND PREEMPTION

The appellees advance a novel approach in an attempt to excuse the lower court's utilization of a test for preemption that was explicitly rejected in *Florida Lime & Avocado Growers Inc.* v. *Paul,* 373 U.S. 132. It is said that preemption and the supremacy clause present two issues which can be considered independently. Such bifurcation is impossible, however, since the preemption doctrine is rooted in, and cannot be dissociated from, the supremacy clause. This is made clear in all the preemption cases of this Court, including *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 157-58.

The appellees do admit, however, that state regulation is preempted when federal law expressly so states. Such is the situation here, for section 45 of the Lanham Act, 15 U.S.C. § 1127 (1970), explicitly provides that the purpose of the Act is "to protect registered marks used in such commerce from interference by State . . . legislation."[7] To permit the Nevada regulation to stand would allow precisely what the Lanham Act was enacted to prevent—the 50:50 rule would interfere with Century 21's 5:1 service mark. As a result, the Nevada regulation is preempted.

[7] The legislative history clearly shows that this explicit statement was fully understood and intended by Congress. *See* Trade-Marks: Hearings on H.R. 102, H.R. 5461, and S. 895 Before the Subcomm. on Trade-Marks of the House Comm. on Patents, 77th Cong., 1st Sess. 124-29, 137-38 (1941).

IV

THE COMMERCE CLAUSE

The appellees contend that summary judgment on the issue whether the 50:50 rule unconstitutionally burdens interstate commerce was proper because the appellants failed to raise disputed fact issues in the court below. This is a misstatement of the record.

Although not fully elaborated, many factual issues found relevant in decisions of this Court involving the burden of local regulation on interstate commerce were raised by the appellants in the record below. For example, there is testimony in the record that the regulation was promulgated at the instance of, and primarily for the benefit of, local concerns, *see Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429; *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333, that the regulation would disrupt the plaintiff's normal operations and cause additional expense, *see Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366; *Pike* v. *Bruce Church, Inc.* 397 U.S. 137, that the 50:50 rule did not further its purported purpose, *see Raymond Motor Transp.,* and that local interests could be promoted equally well by alternatives with a lesser impact on interstate activities, *see Cottrell; Pike.* These issues were clearly raised and before the court below; it was further explication of these factual issues, among others, that the appellants would have made at a plenary trial if they had been permitted to do so.[8]

The court below, however, foreclosed further development of these issues when it held that "[*w*]*hatever*

[8] The appellants did not move for summary judgment on this issue in the court below.

incidental burden on interstate commerce may exist," 448 F. Supp. at 1242 (emphasis added), it is outweighed by local interests. By this language, the court below made it apparent that it did not perform the careful balancing of the harmful effects of this regulation on interstate commerce against the dearth of compensating benefits to local interests. Since there were material issues of fact in dispute in the record below, summary judgment on this issue was improper.

CONCLUSION

For the reasons recounted above and in the appellants' jurisdictional statement, the motion of appellees to dismiss or affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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January 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-683

CENTURY 21 REAL ESTATE CORPORATION; CENTURY 21 REAL ESTATE OF ARIZONA, INC.; SOUTHERN NEVADA FRANCHISE SERVICE CO., INC., ROBERT E. BARRETT; AND BARRETT & CO., INC., REALTORS,

Appellants,

v.

NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS, ELIZABETH M. KROLAK; FRED M. SCHULTZ; OLIVA D. SILVAGNI; CARL F. FUETSCH; AND ANGUS W. MCLEOD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

BRIEF AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT SUBMITTED ON BEHALF OF THE UNITED STATES TRADEMARK ASSOCIATION

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IN THE

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OCTOBER TERM, 1978

No. 78-683

CENTURY 21 REAL ESTATE CORPORATION; CENTURY 21 REAL ESTATE OF ARIZONA, INC.; SOUTHERN NEVADA FRANCHISE SERVICE CO., INC., ROBERT E. BARRETT; AND BARRETT & CO., INC., REALTORS,

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v.

NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS, ELIZABETH M. KROLAK; FRED M. SCHULTZ; OLIVA D. SILVAGNI; CARL F. FUETSCH; AND ANGUS W. MCLEOD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The United States Trademark Association hereby moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. The appellants have consented to the filing of such brief. The appellees, through the Attorney General of the State of Nevada, have refused consent.

As more fully explained in the accompanying brief, The United States Trademark Association represents many trademark owners throughout the United States and the Association's purposes include the protection of the interest of the public in the use of trademarks, the promotion

and the furtherance of the trademark concept and the protection of the rights of all trademark owners.

The United States Trademark Association believes that the Nevada regulation involved in this appeal is inconsistent with and is preempted by the United States Trademark Law, the Trademark Act of July 5, 1946, commonly called the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, in that it impermissibly interferes with use of and dilutes a mark protected under said Act.

Further, if permitted to stand, this decision will become the basis for other states to pass legislation interfering with trademarks in commerce. Such interference is adverse to the interests of the public and trademark owners; the effect of the decision could be a burden on interstate commerce and increase costs of goods and services to consumers.

The United States Trademark Association was an active participant in the legislative process which resulted in the passage of the Lanham Act in 1946. As more fully explained in the accompanying brief, the question of preemption was discussed during the Congressional hearings. The United States Trademark Association is in an unique position to function as *amicus curiae* in this appeal since it participated actively in the development of the Lanham Act and, more specifically, in the discussions evidencing Congressional intent to preempt state interference with marks protected under the Lanham Act.

For these reasons the motion for leave to file the attached brief of *amicus curiae* should be granted.

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In the

Supreme Court of the United States

October Term, 1978

No. 78-683

Century 21 Real Estate Corporation; Century 21 Real Estate of Arizona, Inc.; Southern Nevada Franchise Service Co., Inc., Robert E. Barrett; and Barrett & Co., Inc., Realtors,

Appellants,

v.

Nevada Real Estate Advisory Commission; Robert W. Hass, Elizabeth M. Krolak; Fred M. Schultz; Oliva D. Silvagni; Carl F. Fuetsch; and Angus W. McLeod,

Appellees.

On Appeal from the United States District Court for the District of Nevada

BRIEF AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Opinion Below

The three judge District Court's opinion is reported at 448 F.Supp. 1237 (D.Nev. 1978). Its order denying a motion for reconsideration of its opinion has not been reported; however, this order was attached to the Jurisdictional Statement filed with this Court.

Jurisdiction

The judgment of the three judge District Court was entered on June 28, 1978. A notice of appeal was filed on August 25, 1978. The appellants filed a Jurisdictional Statement on October 23, 1978, invoking jurisdiction of this Court under 28 U.S.C. §§ 1253 and 2281. The Appellees' Motion to Dismiss or Affirm was filed on December 26, 1978.

Interest of Amicus Curiae

The United States Trademark Association (USTA) is a non-profit membership corporation whose purposes are to protect the interest of the public in the use of trademarks, to promote and further the trademark concept and to protect the rights of all trademark owners.

USTA has 425 regular members in the United States (companies located throughout the United States which own trademarks), 25 regular members in foreign countries, 69 supplementary members (companies affiliated with regular members) and 813 associate members (lawyers, law firms, advertising agencies and other firms having a special interest in trademarks), of which 429 are domiciled in the United States and 384 are domiciled in foreign countries.

The USTA is concerned with the decision below for the following reasons.

The Nevada regulation is inconsistent with the United States Trademark Law, the Trademark Act of July 5, 1946, commonly called the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, in that it impermissibly interferes with the use of and dilutes a mark protected under said Act.

Further, if permitted to stand, this decision will become the basis for other states to pass legislation interfering with trademarks used in commerce. Such interference is adverse to the interests of the public and trademark owners; the effect of the decision could be a burden on interstate commerce and increase costs of goods and services to consumers.

The Questions are Substantial

The decision of the three judge District Court upheld Section VII(4) of the Rules and Regulations of the Nevada Real Estate Advisory Commission, which requires, *inter alia,* that a real estate broker who operates under or uses a franchise name shall:

> . . . incorporate in the franchise name and logotype his own name; however, the broker's name may not be less than 50 percent of the surface area of the entire combined area of both the broker's name and the trade name or logotype . . .

This regulation imposes severe and unprecedented restrictions on the use of a service mark in the United States. As a result, the decision presents novel and important questions which not only warrant but require review by this Court.

Section VII(4) of the rules and regulations of the Nevada Real Estate Advisory Commission is inconsistent with and, therefore, is preempted by the Lanham Act, 15 U.S.C. §§ 1051 et seq.

Section 45 of the Lanham Act, 15 U.S.C. § 1127, states Congressional intent:

> The intent of this Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; [and] *to protect registered marks used in commerce from interference by State, or territorial legislation;* . . . (Emphasis added)

The Supreme Court test of whether a federal statute preempts state regulation is twofold. Federal preemption occurs when:

> . . . either . . . the nature of the regulated subject matter permits no other conclusion, or . . . the Congress has unmistakably so ordained. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 83 S.Ct. 1210, 1217, 373 U.S. 132, 142 (1963)

Here, the Congress has unmistakably so ordained.

The Legislative history of the Lanham Act demonstrates Congress' specific intent to preempt all state regulation. The Lanham Act was the product of eight years of debates and hearings in Congress. Although the first Bill introduced, H.R. 9041, 75th Congress, 3rd Session (1938), did not contain the "state interference" provision, this language did appear in Section 45 of H.R. 6618, 76th Congress, 1st Session (1939), in the same language as that ultimately enacted in 1946 except for the words "or territorial".

The American Bar Association, during one phase of the hearings, recommended that the state interference provision be deleted from the Act as redundant. This recommendation precipitated a debate over the import and meaning of this language.

The United States Trademark Association (now amicus curiae) at that time submitted a position paper which stated the following:

> It is our belief that by now striking this statement, a dangerous inference might be created to the effect that the belated deletion of this language would indicate an intention on the part of Congress to permit the various States to interfere with nationally registered trademarks in any way which is not expressly prohibited by

> other sections of the act. This interpretation might, for example, permit the taxing of such trade-marks by the States or the imposition of other burdens and conditions on the use of such registered marks. This would be contrary to the fundamental purpose of the bill and would also lose sight of the fundamental principle of constitutional law that concurrent jurisdiction over commerce between the Federal Government and the States exists only to the extent that such jurisdiction is not exclusively appropriated and exercised by the Federal Government. *It seems to be entirely proper, therefore, that the intention of Congress to exclude the State governments from any interference with the use of registered marks in interstate commerce should be unequivocably declared in the act.* (Emphasis added) Trade-Marks; Hearings on H.R.102, H.R.5461 and S. 895 Before the Sub-Committee on Trade-Marks, Committee on Patents, House of Reps., 77th Cong., 1st Sess. (1941) (p. 126)

Congressman Martin, in commenting on Section 45, stated that:

> . . . there can be no question but that the intent of this act is to regulate trade-marks insofar as Congress has the power to do so. (*Id.,* at 127)
>
> . . . the fact is that a State legislature cannot interfere with a mark used in commerce as defined here whether it is registered or not registered. (*Id.,* at 127-128)

Edward S. Rogers, a leading trademark practitioner, in arguing that the "state interference provision" remain in the Act, stated as follows:

> If it had not been in at all, of course, there would be no objection to taking it out. But once it has been in legislation and in bills that have passed both Houses it occurs to me that if it were taken out at this junction an

inference might be drawn that would be unfavorable and undesirable because as the committee knows several times we have called your attention to the fact that the States have been legislating on trade-marks and that the legislation is inconsistent with the Federal Constitution. And more than that it is a clear inference that interstate commerce, for example, there is the State of Nevada, I think it was last year, provided by statute that no trade-mark could be owned unless it were registered in that state within 6 months and thereafter it could be registered by anybody and thereupon the persons who were registering became the owner. That passed the houses of the legislature out there but was vetoed. It is a symptom of similar legislation that is being introduced. The result would be in effect a tariff wall around different states interfering with the interstate sale of goods under trade-marks originating outside and at the time that these bills were first proposed it was deemed desirable to have a statement of purpose. One of the purposes of the legislation was to regulate commerce and prevent inconsistent—protect interstate commerce against inconsistent State legislation. (*Id.*, at 124)

Congressman Lanham, Chairman of the Subcommittee, stated that if the "state interference" provision was surplus, it did no harm to include it. Mr. Fenning's statement leaves no doubt as to the meaning of this provision of the Act:

> There is a particular advantage in having it here. As I understand constitutional law, if Congress does not cover a field the State legislatures may enter that field. Here is a definite statement that it is the purpose of Congress to cover the entire field and take all of the rights which Congress may exercise to itself, so that the States may not exercise any of those rights. And for that reason it is important, it seems to me, to have it in. (*Id.*, at 128)

These statements by members of Congress and interested members of the public leave no doubt that in retaining the state interference provision in the Lanham Act, Congress clearly intended to preempt all state regulation that would interefer with the use of trade-marks in interstate commerce. Congressman Lanham, after whom the Act was named, guided the Act through its eight year legislative history and was particularly active in the debate relating to the state interference provision. The 79th Congress ultimately passed the Lanham Act although no hearings were held on the Act in that Congress. Anticipating the need of the courts in the future for a legislative history, Chairman Lanham made the following statement during House debate of the conference report:

> Mr. Speaker, the legislative history of this act is long and extensive. Many hearings have been held over a period of almost 8 years. *Those hearings may, and probably will, be referred to by the courts in construing and interpreting the provisions of the act.* (Emphasis added) 92 Cong. Rec. 7524 (1946)

In 1978, some 37 years after the referenced hearings, The United States Trademark Association maintains the same position with respect to the intent and meaning of the Lanham Act. The USTA submits that the Lanham Act preempts the Nevada regulation in question.

CONCLUSION

The questions presented by this appeal are substantial and warrant review by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-683

CENTURY 21 REAL ESTATE CORPORATION; CENTURY 21 REAL ESTATE OF ARIZONA, INC.; SOUTHERN NEVADA FRANCHISE SERVICE CO., INC.; ROBERT E. BARRETT; AND BARRETT & CO., INC., REALTORS,

Appellants,

v.

NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS; ELIZABETH M. KROLAK; FRED M. SCHULTZ; OLIVIA D. SILVAGNI; CARL F. FUETSCH; AND ANGUS W. McLEOD,

Appellees.

On Appeal From the United States District Court for the District of Nevada

OPPOSITION TO THE UNITED STATES TRADEMARK ASSOCIATION'S REQUEST TO FILE A BRIEF AMICUS CURIAE

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SPO, Carson City, Nevada, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-683

CENTURY 21 REAL ESTATE CORPORATION; CENTURY 21 REAL ESTATE OF ARIZONA, INC.; SOUTHERN NEVADA FRANCHISE SERVICE CO., INC.; ROBERT E. BARRETT; and BARRETT & CO., INC., REALTORS,

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NEVADA REAL ESTATE ADVISORY COMMISSION; ROBERT W. HASS; ELIZABETH M. KROLAK; FRED M. SCHULTZ; OLIVIA D. SILVAGNI; CARL F. FUETSCH; and ANGUS W. MCLEOD,

Appellees.

On Appeal from the United States District Court for the District of Nevada

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OPPOSITION TO THE UNITED STATES TRADEMARK ASSOCIATION'S REQUEST TO FILE A BRIEF AMICUS CURIAE

Interest of Amicus Curiae is Insufficient to Warrant Consent to File as Amicus Curiae

The United States Trademark Association (USTA) has no substantial interest in joining as Amicus Curiae in the above-entitled action.

USTA's stated interest in requesting leave to file a Brief as Amicus Curiae is that the regulation promulgated by the Nevada Real Estate Advisory Commission "impermissibly interferes with the use of and dilutes a mark protected under" the Lanham Act. (15 U.S.C. §§1051 et seq.)

The regulation at issue is Section VII (4) of the Rules and Regulations of the Real Estate Advisory Commission which provides:

> "Any broker who operates under or uses a franchise name shall:
>
> a. register such franchise name with the division on a form to be supplied by the division; and

> b. incorporate in the franchise name and logotype his own name; however, the broker's name may not be less than 50 percent of the surface area of the entire combined area of both the broker's name and the franchise name or logotype; and
>
> c. conspicuously display on or in all his advertising, and on his letterhead, deposit receipt forms, listing agreements and other printed materials generally available to the public a statement to the effect that his real estate brokerage office is independently owned and operated.
>
> For the purposes of this section, the term 'broker's name' is that name which appears on the real estate broker's license granted by the Nevada Real Estate Division."

A reading of this regulation illustrates that the actual physical appearance of the trademark of Century 21 is not affected. There is no dilution of Century 21's trademark. The regulation merely provides that the franchisee's "name may not be less than 50 percent of the surface area of the entire combined area of both the broker's name and the franchise name or logotype. . ." Thus, Century 21's entire logotype, which is protected by the Lanham Act, can appear unaltered on half of the sign and the

broker's name can appear on the other half. The logotype remains the same and its size can remain the same so long as the broker's name is as large as the logotype. This does not dilute the trademark. The public's ability to identify the broker's affiliation with Century 21 is not diminished.

Appellants and USTA contend that the lower court's analysis of the Lanham Act's relationship to the regulation at issue was in error. It is argued that the lower court utilized the wrong test to determine whether preemption had occurred. The Court in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) held:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." (373 U.S. at 142)

In deciding that the regulation at issue does not infringe upon an area preempted by the federal statute, the lower court found that the state regulation comports with the policies

of the Lanham Act, and that the regulation does not conflict with the Act's purpose of protecting trademarks against unlawful use by others. This analysis does not conflict with the test enunciated in Paul, supra, in that the lower court concluded that both regulations can be enforced without impairing federal preemption of the field.

The regulation at issue does not stand "as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67; quoted in Florida Lime and Avocado Growers, Inc. v. Paul, supra, and in Mariniello v. Shell Oil Company, 511 F. 2d 853, 856 (3rd Cir. 1975).

Thus, it is apparent that the lower court's Decision should be affirmed and that USTA does not have a sufficient interest to warrant the Court's granting leave to the association to file an Amicus Curiae Brief. Therefore Appellees would request the Court to withhold consent.

DATED this 29 day of January, 1979.

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